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No. 113

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

UNITED STATES OF AMERICA, *Petitioner*,

v.

HOMER O. CORRELL AND DOROTHY CORRELL,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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AMICUS CURIAE BRIEF OF BUREAU OF SALESMEN'S NATIONAL ASSOCIATIONS IN SUPPORT OF RESPONDENTS

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STATEMENT

This *amicus curiae* brief is respectfully filed on behalf of the Bureau of Salesmen's National Associations[1] in support of the respondents in the above

[1] The Bureau of Salesmen's National Associations is composed of three member organizations, each organization in turn is composed of salesmen who travel for their livelihood.

styled and numbered cause. Consents of the parties, pursuant to Rule 42(2) of the Rules of the Supreme Court of the United States, have been obtained and are furnished herewith.

The individual members of the Bureau's member organizations are 15,000 traveling salesmen, engaged in the wholesale sale of garments and related accessories to retail commercial establishments. These establishments are located in each of the 50 states of the United States and Canada. Members of the organizations, in selling to these establishments, spend much of their time traveling, both on overnight and one-day trips. Because of their frequent travel, the salesmen will find any decision by this Court concerning the deductibility of the costs of meals incurred on one-day business trips has great impact on their lives and the manner in which they do business.

INTRODUCTION

At the outset, this amicus notes its full agreement with the Government in framing the issue in terms of the dichotomy between sections 162 and 262,[2] as follows.

> "Is the deduction allowable because the money was spent in the course of taxpayer's business activities? Or is it not because the cost of food is an ordinary expense of everyday life?"[3]

The fundamental question here is whether the cost of a meal eaten in a restaurant in the course of a one-day business trip is the result of business needs and

[2] All references are to the Internal Revenue Code of 1954 unless otherwise indicated.

[3] Brief for the United States, p. 5.

demands rather than the personal conveniences and necessities of the taxpayer. *Commissioner* v. *Flowers,* 326 U.S. 465 (1945). The language of section 162(a)(2) does not itself resolve this issue. Assistance must be sought in administrative and judicial rules which, by construction of the statutory language, make section 162(a)(2) relevant and meaningful in the manifold situations to which it may apply.

One such rule is provided by the Commissioner's definition of "home" as the taxpayer's principal post of duty. See, Rev. Rul. 63-82, 1963-1 Cum. Bull. 33; G.C.M. 23672, 1943 Cum. Bull. 66. "Home" is generally understood to encompass the metropolitan area where the taxpayer regularly works or mainatins his business headquarters. *Amoroso* v. *Commissioner,* 193 F.2d 583 (1st Cir., 1952) cert. den. 343 U.S. 926 (1952); Rev. Rul. 55-236, 1955-1 Cum. Bull. 274. This expansive definition of "home" elminates from consideration the meal expenses of the commuter and of the taxpayer who makes short trips in and around the metropolitan area of his "home". Amicus does not challenge this extension of the common meaning of "home" as being unfair.

Thus, (to use examples posed by the Petitioner), any taxpayer, on the one hand, who either lives and works in Manhattan but buys lunch on a trip to Newark, or the salesman or doctor who spends part of his working day in Westchester,[4] has not left the New York metropolitan area (his "home" within Rev. Rul. 55-236, *supra*). Therefore, not being in the "travel status" required by section 162(a)(2), he cannot deduct the cost of meals incurred during such a

[4] Brief for the Petitioner, at 6.

day. Any taxpayer, on the other hand, who takes a train to Philadelphia or flies to Chicago is, however, distinguishable from the taxpayer who never leaves his metropolitan area. That he eats one or more meals in a restaurant is no longer a matter of personal predilection. Business demands that he spend some or all of his day in a distant city. Therefore, business requires him to eat one or more meals in a restaurant. That he is able to return to his residence to sleep does not change the basic situation during working hours.

Amicus submits that a rule which determines whether and when a taxpayer is "away from home" must do so in light of the nature and motivation of his expenses: allowing a deduction for business induced expenditures while disallowing one for personal expenditures.[5]

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[5] Usually lunch, or any meal, eaten in the taxpayer's metropolitan area is the result of "personal conveniences and necessities." "Duplication" of expenses has, we submit, little weight in this situation. In *Commissioner* v. *Flowers*, *supra*, taxpayer clearly duplicated both food and lodging expenses, but no deduction was allowed since such duplication was the result of personal choice. Moreover, all meals eaten in a restaurant duplicate to some extent the personal expenses of home preparation. The question here is not whether such costs are duplicated, but why they are duplicated. If motivation is personal, no deduction is allowed; but if the cause is business, the taxing pattern established by the Code permits a deduction.

ARGUMENT

1. THE "OVERNIGHT" RULE, AS AN ADMINISTRATIVE GLOSS ON SECTION 162(a)(2), SHOULD NOT BE THE EXCLUSIVE TEST OF DEDUCTIBILITY OF THE COST OF MEALS; OTHER TESTS ARE APPROPRIATE

The "overnight" (or "substantial-sleep-or-rest")[6] rule was devised to assist the Internal Revenue Service in applying section 162(a)(2). Its purpose was and is to distinguish business from personal expenses by making an objective, though somewhat arbitrary, determination of when a taxpayer is "away from home".[7]

The "overnight" rule is properly applicable in the case of certain transportation workers, e.g., a railroad employee.[8] *Fred M. Osteen,* 14 T.C. 1261 (1950); *Sam J. Herrin,* 28 T.C. 1303 (1957). In this context, the rule's function is to deny the special "travel status" of section 162(a)(2) to persons whose work is in transportation, thus keeping meals an essentially personal and non-deductible expense. However, while the "overnight" rule is suited to the situation of certain transportation workers, we contend that it should not be the exclusive test of the deductibility of meals under section 162(a)(2). When a person travels in

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[6] Rev. Rul. 54-497, 1954-2 Cum. Bull. 75.

[7] *Williams* v. *Patterson,* 286 F. 2d 333 (5th Cir., 1961).

[8] "Home" for such persons has been defined as the railroad (or truck) terminal where the employee starts and finishes each day's work. I.T. 3395, 1940-2 Cum. Bull. 64. If the employee is on a "turn-around" run (comparable to a one-day business trip), his daily routine takes him a substantial distance "away from home" and back again. He may eat at least one meal *en route.* However, assuming a normal working day, the fact that his work is mobile rather than stationary is an insufficient basis to allow him to deduct the cost of meals under section 162(a)(2). *Cf., Jerome Mortrud,* 44 T.C. 208 (1965); *Fred G. Armstrong,* 43 T.C. 733 (1965).

order to transact business at a distant point, the "overnight" rule does not rationally serve the purpose for which it was designed: to indicate whether the cost of a meal was incurred as a personal or business expense. *United States* v. *Morelan*, 356 F. 2d 199 (8th Cir., 1966); *Hanson* v. *Commissioner*, 298 F. 2d 391 (8th Cir., 1962).

Rather, arbitrary and unreasoned application of the "overnight" rule to all persons, however situated, often produces unjust results. Thus, a salesman with widely separated territories is burdened by application of the "overnight" rule. He may drive to one area (away from his principal post of duty) to service it. The cost of meals will be deductible if he chooses, or can afford to stay overnight. However, if he extends his working day to return home in order to service his customers in another area the following day, the deduction is denied. The "overnight" rule penalizes the taxpayer who has a tighter schedule, who works a longer day, or who can least afford the cost of lodging. But, in this context, the rule does not rationally indicate under most modern-day travel conditions whether the meal or meals was a business or personal expense.

II. A TAXPAYER SHOULD BE ENTITLED TO DEDUCT THE COST OF MEALS INCURRED IN PURSUIT OF HIS TRADE OR BUSINESS, REGARDLESS OF WHETHER OR NOT HE IS AWAY OVERNIGHT, IN ANY ONE OF THE FOLLOWING SITUATIONS.

We believe that other tests, in addition to the "overnight" rule are appropriate to determine the deductibility of meals under section 162(a)(2)—tests which, we suggest, will operate more fairly in light of the realities of modern-day business travel, and which, we also suggest, are not any more difficult or inconvenient to administer than the "overnight" rule. Thus, we believe that whether the taxpayer is "away from home"

may be objectively determined by benchmarks other than, and in addition to, the "overnight" rule. For example, both hours spent and miles traveled away from the taxpayer's principal post of duty are equally valid indicia under section162(a)(2). While no simple mathematical formula is proposed (or can be devised), and while each case must be decided on its own facts and circumstances, the elements of a general rule, capable of easy administration, are hereby proposed.

A. Where the Taxpayer Travels a Substantial Distance "Away From Home"

In some cases the taxpayer will be away from his principal post of duty a relatively short period of time.[9] But in this age of jet travel[10] great distances

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[9] The fact that taxpayer does not duplicate lodging expenses on such a trip is not relevant in the present case. Yet Petitioner argues at p. 7 of his brief (and repeats the argument at p. 30) that duplication of lodging expenses is a necessary precondition to a deduction for meals. Why this should be so is never stated. Duplication of meal expenses occurs at any time the taxpayer has incurred the costs of food preparation in his residence, but eats elsewhere. Such duplication has no necessary relation to the additional costs incurred if and when the taxpayer also sleeps in a hotel or motel. See, also, footnote 5 on p. 41, *supra*. Moreover, whether duplication is anything more than an illusory rationalization for the operation of section 162(a)(2) is open to question. See, *William A. Bagley*, 46 T.C. 176 (1966), rev'd *sub nom. Commissioner* v. *Bagley*, 374 F. 2d 204 (1st Cir., 1967), where the Internal Revenue Service conceded that taxpayer was entitled to deduct the cost of meals incurred on overnight trips despite the fact that taxpayer always ate *all* his meals in a restaurant. In this situation no duplication of costs was possible.

[10] A person is often served a "complimentary" meal while traveling by plane; yet the Commissioner apparently does not require reduction of the amount deductible as a transportation expense to account for such meals. This heightens the discrimination produced by the "overnight" rule: a person who travels by car or train is allowed no such tax benefit.

may be traversed in a single day without need of sleep or rest. In *Gerald G. Smith,* 25 T.C.M. 1266 (1966), taxpayer's home was in the Los Angeles area. He flew to San Francisco to transact business, returning to Los Angeles by mid-afternoon of the same day. The distance traveled (some 400 miles) was substantial. Such distance clearly indicates that the taxpayer was "away from home" as that phrase is commonly and ordinarily understood.

To say that the taxpayer is not "away from home" when he travels substantial distances detaches the Internal Revenue Code from reality, creating unnecessary and confusing legal fictions. If anything, the "overnight" rule applied in this context makes the Code more difficult for the ordinary taxpayer to understand in a collection system which ultimately depends on self-administration of the law.

B. Where the Taxpayer Spends Substantial Time "Away From Home" During the Day as to Necessitate Purchasing a Second Meal

In other cases the taxpayer travels relatively short distances away from his principal post of duty (75 or 100 miles), but his day is a long one. Here one indication that the taxpayer is "away from home" within section 162(a)(2) is that his trade or business requires that he eat more than one meal outside the general area of his home. In the present case, the exigencies of the taxpayer's business required him to work more than 12 hours a day, having two meals (breakfast and lunch) on the road. In *William A. Bagley,* 46 T.C. 176 (1966), rev'd *sub nom. Commissioner* v. *Bagley,* 374 F. 2d 204 (1st Cir., 1967), taxpayer returned home after 10 p.m., often eating three meals at his away-from-home loca-

tion. See, also, *Hanson* v. *Commissioner,* 298 F. 2d 391 (8th Cir., 1962).

Where the taxpayer travels some distance from his principal post of duty, and his working day is such that he must eat either breakfast or dinner before returning, we believe that the time spent in "travel status" is sufficiently substantial to allow him to deduct the cost of his meals under section 162(a)(2).

III. THE TRAVEL AND ENTERTAINMENT RECORD-KEEPING REQUIREMENT OF SECTION 274 PROVIDES THE NECESSARY ADMINISTRATIVE SAFEGUARDS TO PERMIT ADOPTION OF OTHER TESTS FOR DEDUCTIBILITY OF MEALS.

While adding nothing of substance to § 162(a)(2),[11] the purpose of the 1962 Act record-keeping requirements set forth in section 274 and specifically section 274(d) is, however, to make the travel and entertainment rules capable of easy administration.

Section 274(d) provides:

> "(d) SUBSTANTIATION REQUIRED.—No deduction shall be allowed—
>
> (1) under section 162 or 212 for any traveling expense (including meals and lodging while away from home),
>
> (2) for any item with respect to an activity which is of a type generally considered to constitute entertainment, amusement, or recreation, or with respect to a facility used in connection with such an activity, or
>
> (3) for any expense for gifts.
>
> unless the taxpayer substantiates by adequate records or by sufficient evidence corroborating his

[11] Section 274(d) provides that the taxpayer must record the amount of expense, time and place where incurred and business purpose in order to be entitled to a deduction under section 162.

> own statement (A) the amount of such expense or other item, (B) the time and place of the travel, entertainment, amusement, recreation, or use of the facility, or the date and description of the gift, (C) the business purpose of the expense or other item, and (D) the business relationship to the taxpayer of persons entertained, using the facility, or receiving the gift. The Secretary or his delegate may by regulations provide that some or all of the requirements of the preceding sentence shall not apply in the case of an expense which does not exceed an amount prescribed pursuant to such regulations."[12] [Emphasis supplied.]

With these detailed records now required indicating the time, place, amount and business circumstances in which meals are eaten, both the taxpayer and the Commissioner's agents will be able to determine readily

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[12] The Treasury Regulations state that, "*In general.* No. deduction shall be allowed for any expenditure with respect to—(1) Traveling away from home (including meals and lodging) deductible under section 162 or 212, * * * unless the taxpayer substantiates such expenditure . . ." Treas. Regs. § 1.274-5(b)(2) provides with respect to travel expenditures, specifically:

"(2) *Travel.* The elements to be proved with respect to an expenditure for travel are—

(i) *Amount.* Amount of each separate expenditure for traveling away from home, such as cost of transportation or lodging, except that the daily cost of the traveler's own breakfast, lunch, and dinner and of expenditures incidental to such travel may be aggregated, if set forth in reasonable categories, such as for meals, for gasoline and oil, and for taxi fares;

(ii) *Time.* Dates of departure and return for each trip away from home, and number of days away from home spent on business;

(iii) *Place.* Destinations or locality of travel, described by name of city or town or other similar designation; and

(iv) *Business purpose.* Business reason for travel or nature of the business benefit derived or expected to be derived as a result of travel."

from analysis of the diary or other contemporaneous records whether the taxpayer traveled sufficient distance or spent sufficient time away from his principal post of duty to be entitled to a deduction under section 162(a)(2). In 1963, the Internal Revenue Service expressed its willingness to undertake such detailed analysis in the interest "of certainty and of uniformity regarding some aspects of the travel expense area." [13] We believe the Petitioner will agree that this detailed record-keeping will afford sufficient administrative safeguards if the overnight rule is expanded as we suggest.

CONCLUSION

The Bureau of Salesmen's National Associations, as *amicus curiae,* recommends to the Court the adoption of the following rule as a guide to the deduction of the cost of meals under section 162(a)(2):

> A taxpayer is entitled to deduct the cost of meals incurred in pursuit of his trade or business:
>
> **(1) If He Travels A Substantial Distance;**
>
> **(2) Spends A Substantial Time Away From His Principal Post of Duty; or**
>
> **(3) Incurs Lodging Expense;**
>
> provided that, as required by § 274, he maintains adequate, contemporaneously prepared records indicating the requisite facts to support such deduction.

In summary, when a taxpayer either travels a substantial distance or spends a substantial time "away

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[13] See, President's 1963 Tax Message, in Hearings before the House Ways and Means Committee, 88th Cong., 1st Sess. at 98-99 (1963).

from home", then, we submit, the cost of meals is a business-induced expense. Under those circumstances, he does not eat in a restaurant as a matter of personal convenience or necessity. Rather, the cause of the additional expenses is directly related to the pursuit of the taxpayer's business. (Contrary to the government's views, this situation is completely distinguishable from the commuter or the taxpayer who never leaves the general metropolitan area of his "home".) We submit that such a taxpayer's expenditures should be deductible under section 162(a)(2).

Respectfully submitted,

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